APPEAL NO. 93399

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), a contested case hearing was held in (city), Texas, on April 22, 1993, (hearing officer) presiding as hearing officer. He determined that at the time the appellant (claimant) was involved in an automobile accident on (date of injury), he was not engaged in or about the furtherance of the affairs or business of the employer. He further found that the respondent (carrier) did timely contest the compensability of the injury, a matter not on appeal. The claimant appeals urging error in the hearing officer's findings of fact and conclusions of law and arguing that the preponderance of the evidence is overwhelmingly in favor of the claimant. Carrier filed a request for review appealing the hearing officer's finding that the claimant was authorized to use the employer's vehicle to drive to and from work on a temporary basis. Carrier also responds to the claimant's request for review and urges that the decision be affirmed.

DECISION

Not finding that the factual determinations, and legal conclusions flowing therefrom, are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, and finding a sufficient evidentiary basis for the decision of the hearing officer, we affirm.

This was basically a case of two distinctly differing versions of the circumstances surrounding the occurrence of an injury: one given by the claimant and one given by the former supervisor. The circumstances surrounding the incident and some inconsistency in prior statements and the testimony given at the hearing apparently became significant in arriving at the findings of fact. Where there is sufficient evidence to support the determinations of the hearing officer and they are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, there is no sound basis to disturb his decision. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e); Texas Workers' Compensation Commission Appeal No. 92234, decided August 13, 1992. Where there are conflicts and inconsistencies in the evidence and testimony, the hearing officer is the one who resolves these matters and makes findings of fact. Garza v. Commercial Insurance Co. of Newark, N. J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Appeal 92234, *supra*; Article 8308-6.34(g). Our review of the complete record in this case renders no basis for us to grant the relief requested or to otherwise alter the decision.

Succinctly, the claimant testified that he was the store manager for an architectural engineering printing service and that the business frequently consisted of picking up and returning projects from customers. Over the weekend of (date of injury), they had a very important rush job that required him to be at the office on Saturday. He claims he went to the office, picked up some boxes that needed to be delivered to a printing company and that on his way back from delivering the boxes he decided he needed to go to his house to pick

up some documents that would assist in getting the job completed on time. He testified that he then intended to return to the office. He also was going to "grab" a sandwich while at the house, but testified that the main reason for going home was to get the documents and that he probably would have gotten lunch somewhere else if he had not decided to go home for the documents. Just short of his home he was involved in a motor vehicle accident. Although he indicates that the police were called, he did not wait around, particularly since the other party involved in the accident had left. He states that he walked home and because he was "shook up" he decided to rest. He did not contact his employer and has never gone back to work for the employer. Although he did not call his employer, his supervisor, (Mr. D), called him later that evening trying to find out where he was. He told Mr. D about the accident but did not mention anything about being on his way home to get some documents. He did not seek any medical attention until after he filed with workers' compensation and the insurance company sent him to a doctor several months later, indicating to him that if he did not go to a doctor, he wasn't hurt. He stated the reason he did not go to a doctor is because he does not like doctors. Subsequent examination and testing (several months after the accident) indicated a ruptured disc. Claimant apparently refused to go to the doctor earlier and he indicated he did not comply with the original orders.

The claimant also testified that the vehicle he was in was a part of his compensation package when he went with the employer, that he always could use it for personal reasons, that the reason he did not indicate until the benefit review conference (BRC) that he was going home for some work-related documents rather than going home for lunch was because he was "shook up" and had not really thought about it and that when he talked to Mr. D on Saturday evening, nothing was mentioned about the documents because he didn't bother Mr. D with trivial matters about work. He stated that Mr. D indicated that he needed to get the project completed and that if claimant did not show up for work, he wouldn't have a job.

Mr. D's testimony largely contradicted the testimony offered by the claimant. He testified that one of the reasons he was no longer with the employer was because he would try to help employees out like the claimant and bend company rules. He testified that a vehicle was never a part of the claimant's compensation package and that he had, without any authority, let the claimant temporarily use the company vehicle to go to and from work since the claimant and his wife had separated and the claimant had no transportation and no funds to acquire transportation. He testified that the temporary nature of the arrangement and the prohibition against using the vehicle for personal matters was well known by and had been discussed with the claimant. He denied that the claimant had any authority to use the vehicle to go home for lunch and stated that the first he had heard anything about the claimant claiming he was going home to pick up documents related to the project was at the time of the BRC. Prior to that, he understood the claimant had always been stating that he was going home for lunch. He also testified that he repeatedly called the office on the morning of (date), that he could not find the claimant anywhere and had

actually talked to claimant's relatives trying to find his whereabouts. He stated that the condition of the project and boxes at the office appeared the same as they were Friday night when he got to the office about noon on Saturday. He stated that he was somewhat excited because no one seemed to be working on the project and he got a call from the printer wanting to know where the project was and that they had people standing by that they had called in especially to work the project. The printer indicated that the project had not been delivered. Mr. D also testified that he could never recall production people like the claimant taking work home, that the employer never got any documents back from the claimant, that such documents the claimant states he had at home would not be necessary for the project, and that that part of the project had been done earlier by the customer. He testified that there would be no reason to take the documents home. He said after he was called by the wrecker service about the company vehicle being stranded, he got hold of the claimant at home and was told "we" had an accident, that the claimant did not indicate he was hurt, and that the claimant stated he did not know if he was going to come into work.

With the evidence in this state, the hearing officer found that although the claimant was temporarily authorized to drive the vehicle to and from work, he was not returning to his home at the time of the accident to retrieve documents needed to complete a special project for the employer and was not performing the work or business of the employer at the time of the accident. As we have indicated, there is sufficient evidence to support his findings. Further, based upon those findings, the hearing officer correctly applied the provisions of Article 8308-1.03(12) which sets forth that travel to and from work generally is not included within the term course and scope of employment unless: (1) it is furnished as a part of the employment contract, (2) the means are under the control of the employer, (3) the employee is directed in the travel, or (4) in situations giving rise to the "dual purpose doctrine," which involves travel for both business and personal reasons. In view of his findings, none of the exceptions applied.

As a result of our affirmance of the decision determining that the claimant was not injured in the course and scope of his employment, we need not determine the question raised by the carrier in its request for review which claims the evidence does not support the findings of fact that the claimant was authorized to use the employer's vehicle to drive to and from work and that the claimant was authorized to use the vehicle at the time of the accident. We do note the supervisor clearly testified that he gave the claimant permission to use the vehicle to go to and from work on a temporary basis but that he, the supervisor, claimed he exceeded his authority in so doing. Whether or not the supervisor was acting within some color of or implied authority relied on by the claimant need not be addressed or decided since there is a sufficient basis to uphold the hearing officer's determination that at the time of the accident, the claimant was not furthering the affairs or business of the employer.

The decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge